

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 8TH OCTOBER 2007 / 16TH ASWINA 1929

CRL.A.No. 226 of 2007()

SC.1237/2005 of ADDL. SESSIONS COURT, FAST TRACK NO.II, PALAKKAD
.....

APPELLANT: ACCUSED:

BENNY @ BABU, AGED 41 YEARS,
S/O.DEVASYA, ANAPPARA CHIRAKKAL VEETIL,
DEVAGIRI, ANGAMALY, ERNAKULAM DISTRICT.

BY ADV. SRI.C.C.THOMAS

RESPONDENT: COMPLAINANT:

STATE OF KERALA REPRESENTED BY
EXCISE INSPECTOR, EXCISE RANGE OFFICE,
PALAKKAD, REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 08/10/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ORDER IN CRL.M.A. NO.1424 OF 2007 IN CRL. APPEAL NO.
226 OF 2007.

DISMISSED

8.10.2007

Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 226 OF 2007

Dated this the 8th day of October, 2007

JUDGMENT

What would be the criminal liability of the registered owner of a vehicle which was alleged to have been used for the offence punishable under the provisions of the Abkari Act, is the legal question raised in this appeal filed against the judgment in S.C. No.1237 of 2005 on the file of the Additional Sessions Court, Fast Track No.II, Palakkad.

2. The appellant -accused faced trial for the offence punishable under Section 55(a) of the Abkari Act. The prosecution case against the accused was that on 13.3.2000 at about 9.30 a.m., a bulk quantity of 6650 litres of spirit in 190 canas each having the capacity of 35 litres were transported in a lorry bearing Registration No.T.N.04 F/3273 which belonged to the accused. To prove the case against the accused, the prosecution examined PWs.1 to 7 and produced Exts.P1 to P15. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the accused was questioned under

Section 313 Cr.P.C.. He denied the prosecution allegation and stated that he was not in any way involved in the case. However, relying on the evidence adduced by the prosecution, the trial court found the appellant - accused guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for nine years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of two years.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. The learned counsel appearing for the appellant has raised the following contentions in challenging the finding entered and the conviction and sentence ordered against the appellant by the trial court: (i) the trial court misread the evidence adduced by the prosecution as there is no legally acceptable evidence to prove that the alleged transportation of spirit in the vehicle during the relevant time was with the consent and connivance of the appellant who was the registered owner of the vehicle, (ii) the prosecution had not proved that the driver of the vehicle and the cleaner who was in the vehicle on the date of the incident were the employees of the appellant and (iii) Ext.P13 report and the claim petition

filed by the appellant under Section 67B of the Abkari Act for release of the vehicle cannot be taken as a ground to find the appellant guilty under Section 55(a) of the Abkari Act.

5. The trial court placed reliance on the evidence of PWs.1, 2 and 5 to 7 who were excise officials. Though PWs.3.and 4 who were examined as independent witnesses turned hostile to the prosecution, they admitted their signatures Ext.P1 seizure mahazar and Ext.P2 arrest memo. PW.1 was the Excise Inspector of Walayar Excise Check Post. He stated that on 13.3.2000 at about 9.30 a.m., lorry bearing Registration No.TN 04 F/32732 along with its consignment and cleaner, one Kannan, were entrusted to Excise department by the Sales Tax authorities and that on examination of the lorry, 190 white plastic canas of 35 litre capacity filled with spirit were found kept underneath 90 sacks of big onion. This witness further stated that he questioned the cleaner of the vehicle who disclosed his name as Kannan. He also stated that the said Kannan told him that the vehicle was driven by one Babu who escaped from the scene of occurrence. Further, this witness stated that Kannan had told him that the spirit was from Karnataka and that he does not know to which place the same was being transported. PW.1 also stated that as per Ext.P1 seizure mahazar, the entire load of spirit was seized, samples were collected for the purpose of

chemical analysis and the said Kannan was arrested. This witness further stated that on examining the cabin of the lorry, it was found to contain photocopy of the trip sheet, insurance certificate and tax disk of the vehicle KL 7 N 1287. He further stated that one number plate stencil cutting of TN 04 F 3273 and four number plate stencil cuttings of KL 7 N 1287 were also recovered from the cabin of the vehicle. PW.1 further stated that the entire matter was entrusted to the Excise Range Inspector, Palakkad for further investigation.

6. The Preventive Officer who was on duty on 13.3.2000 in the Walayar Excise Check Post was examined as PW.2. He gave evidence in corroboration with the evidence given by PW.1. PW.5, the then Excise Inspector, Palakkad Excise Range Office stated that he continued the investigation and questioned some of the witnesses. This witness further stated that Kannan was arrested and produced before the court along with Ext.P10 crime and occurrence report and that the said Kannan was in judicial custody for sometime. PW.6 was the Excise Inspector of Palakkad Excise Range during the relevant time. He stated that he was present at the time of detection of the crime. PW.7 stated that he continued the investigation and filed Ext.P13 report by which the appellant was arrayed as an accused in the case. He also proved Ext.P14 chemical

examination report. This witness further stated that the person who was in the vehicle had absconded after he was released on bail and that the driver of the vehicle was not arrested as his whereabouts were not known and hence charge was filed against the appellant alone.

7. The learned trial Judge found that as per Ext.P13 report filed by PW.7, the appellant - accused was the registered owner of the vehicle in question and as the accused had no consistent case regarding the use of the vehicle for commission of offence under the provisions of the Abkari Act, he was found guilty under Section 55(a) of the Abkari Act, being the registered owner of the vehicle from which the bulk quantity of spirit was seized. From the evidence adduced by PWs.1, 2 and 5 to 7, the trial court found that the vehicle in question was used for transporting spirit. The trial court also found that the evidence collected by the excise officials would show that the vehicle involved in the commission of the offence actually belonged to the accused as the registration certificate stood in his name. The trial court also found that the bogus Registration No.T.N.04 F/3273 was used with the knowledge and consent of the accused. If so, applying the presumption contained in Section 114 of the Indian Evidence Act, 1872, it can be presumed that the accused was responsible for transporting the spirit during the relevant time. The trial court further

found that the accused had no consistent case regarding the use of the vehicle as he had taken the stand before PW.5 that the vehicle was transferred to one Balasubramanian for an amount of Rs.1,50,000/- and that he was not aware of anything after the transfer of the vehicle. The question to be considered is how far the prosecution had succeeded in proving that the vehicle in question was used for commission of offence punishable under the provisions of the Abkari Act with the consent, knowledge or connivance of the appellant, the registered owner of the vehicle. In this context, the evidence of PWs.1, 5 and 6 are very relevant. PW.1 had stated that the cleaner of the vehicle who was arrested did not say anything about the identity of the registered owner of the vehicle or that he was the employee of the accused. PW.5 had stated that it was only after verifying the records of KL 7 N 1287 with the Regional Transport Office, Alwaye that he came to know that the accused was the registered owner of the vehicle in question. He also stated that he had not made the registered owner an accused in the case registered against the cleaner and driver of the vehicle. He also stated that the appellant told him that the vehicle in question was transferred to one Balasubramanian and that the documents regarding the same can be produced. PW.6 had also deposed that when the lorry was taken into custody with the spirit, the cleaner of the lorry who was also taken into custody had not stated that he was the

employee of the accused. When cross-examined, this witness stated that when he was questioned by the Excise Inspector he had not stated that the accused was the registered owner of the vehicle in question or that the accused was involved in the case. Even PW.7 had not given any evidence regarding the involvement of the accused in transporting spirit. He also stated that he had given Ext.P13 report on the basis of the registration records of the vehicle and the appeal filed by the accused in the confiscation proceedings. Another ground relied on by the learned trial Judge to find the appellant - accused guilty was the statement given by the accused before the excise officials that the vehicle was taken by his driver, one Mohanan and that he was informed that the said Mohanan was sick on the day of the incident. But, this fact was also not proved and hence, the trial court found that it was the accused who had allowed his employees to use his vehicle for transporting spirit. Admittedly, the prosecution had not succeeded in proving that either the cleaner or the driver of the vehicle were the employees of the appellant - accused. In the decision of this Court reported in **Sooraj v. Excise Inspector, 2002 (1) K.L.J. 739**, this Court had categorically held that unless and until the prosecution has succeeded in proving that the owner of the vehicle was involved directly or indirectly in transporting liquor, such owner cannot be charged with an offence under Section 57A of the Abkari Act. In the

above case, this Court held that the accused therein was implicated only because of the fact that registration of the vehicle involved in the case stood in the name of the accused. Though the trial court considered the above judgment, in the light of the facts proved, the trial court found that the facts of the above case was not applicable to the present case. In the above case, though one of the accused was the brother of the registered owner, this Court held that the registered owner shall not be implicated without any evidence of his involvement.

8. It is seen that the prosecution had not succeeded in proving that either Kannan or the driver of the vehicle was an employee of the accused and hence, no presumption can be raised against the appellant. This point was considered by this Court in the decision reported in **Roshy v. State of Kerala, 2005(3) K.L.T. 796**. In the above judgment, while considering Section 64 of the Abkari Act, this Court held that **"The presumption under S.64 of the Abkari Act cannot be invoked, unless it is proved by cogent evidence that the offence was committed with his knowledge or his consent"**. In this context, the learned Public Prosecutor submits that it is the duty of the appellant to prove that the vehicle was used for the commission of the offence without his consent, connivance or knowledge. The learned Public Prosecutor further submits that the appellant had no

consistent case before the court regarding the use of his vehicle by the persons involved in the commission of the offence and hence he can be roped in for the offence under Section 64 of the Abkari Act. But, this Court had considered this position in the decision reported in **Rajan v. Excise Inspector, 2004(2) K.L.T. 430** and held that Section 64A of the Abkari Act can be invoked only against an owner whose land, building, room, space, enclosure or such place as defined under sub-section (21) of Section 2 of the Abkari Act is used for the commission of the offence. If so, even the extended liability of a registered owner of a vehicle under Section 64A of the Abkari Act cannot be drawn against the accused. He can be found guilty only on proving that the vehicle was used for the commission of the offence with the knowledge, consent and connivance of the owner.

9. In the light of the principles enunciated in the above judgment, this Court is of the view that the finding entered by the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act only on the basis of the registration certificate is not legally sustainable. Criminal liability of a registered owner under the provisions of the Abkari Act and the defence available to a registered owner in a quasi judicial proceedings are different and the degree of proof also is

different. The criminal liability cast under Section 55(a) of the Abkari Act is different from that of a liability cast on the registered owner under Section 67B of the Abkari Act where confiscation proceedings are initiated against such registered owner. In order to find a registered owner guilty under criminal law the prosecution should prove by clear and cogent evidence that the registered owner is also involved in the commission of the alleged offence.

10. In the light of the discussions made above , this Court is of the view that the impugned judgment is liable to be set aside. Accordingly, the conviction entered and the sentence ordered by the trial court against the appellant - accused are set aside and the appellant is acquitted of the charges levelled against him.

The Crl. Appeal is allowed. The bail bonds executed by the appellant shall stand cancelled. It is made clear that amount, if any, deposited by the appellant shall be refunded to him as per law.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.

JUDGMENT

OCTOBER, 2007